

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 5
5350357

BETWEEN JAMES IAN McMURDO
 Applicant

AND DAVIE NORRIS
 BOATBUILDERS LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Georgina Burness, Advocate for the Applicant
 Davie and Jenny Norris, for the Respondent

Investigation Meeting: 19 December 2011 at Christchurch

Submissions Received: 19 December 2011 from the Applicant
 19 December 2011 from the Respondent

Determination: 12 January 2012

DETERMINATION OF THE AUTHORITY

- A. The Applicant was not unjustifiably dismissed.**
- B. The Applicant was unjustifiably disadvantaged and is awarded compensation in the sum of \$4,000.**
- C. Costs are reserved.**

Employment relationship problem

[1] Mr McMurdo alleges that he had been unjustifiably dismissed and had suffered an unjustified disadvantage in that he had been treated differently from other employees. He seeks compensation for lost wages in the sum of \$4,000, together with compensation pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$4,000, together with costs.

The facts

[2] The respondent operates a boat building business, manufacturing high value racing yachts to order. Mr McMurdo worked for the respondent as an apprentice boat builder subject to a training agreement dated September 2009. It is unclear whether he was still employed pursuant to that agreement at the time when his employment came to an end, but that is not material to the problem under investigation. No individual employment agreement had been issued to Mr McMurdo.

[3] Mr McMurdo had been working at the respondent's premises in Christchurch on Tuesday, 22 February 2011 when the magnitude 6.3 earthquake struck at 12.51pm.

[4] Unsurprisingly, all employees were anxious to leave work to check on their homes and loved ones and the owners and operators of the respondent, Mr and Mrs Norris, allowed everyone to leave work in order to do so. Mr and Mrs Norris' evidence was that they had told all the staff to go but had also told them that the company would aim to be up and running again on the following Monday. However, they did concede that in the relative chaos that ensued immediately after the earthquake, not everyone, including Mr McMurdo, may have heard them say that they would be operating again on Monday 28 February.

[5] During Wednesday, Thursday and Friday immediately following the earthquake, Mr and Mrs Norris had been in the workplace making it safe, assisted by a few of their employees. They accepted that they had not asked Mr McMurdo to go to work to assist in that process.

[6] In the meantime, Mr McMurdo, who lived as a solo parent with his nine year old son in rented accommodation shared with the landlady, found himself in the position of having to seek alternative accommodation due to damage to the premises in which he lived. Accordingly, Mr McMurdo decided to leave Christchurch in order to protect the health of his young son. It should be noted that Mr McMurdo lived in Aranui, an area that had been particularly badly hit by the earthquake and which, in those three days immediately after the earthquake, had no power, sewerage or running water.

[7] Mr McMurdo and his son initially stayed in Kaikoura and, on Monday, 28 February 2011, drove to Picton and took the ferry to Wellington in order to travel on to Hastings to stay with a relative. Mr McMurdo gave evidence that his mobile telephone had gone flat by that point. It is probable that Mr McMurdo has become confused about exactly when his telephone became flat because of evidence given by Mr and Mrs Norris that Mr McMurdo had exchanged texts with one of his work colleagues during that ferry journey. However, for reasons that will become apparent, nothing material hinges on this.

[8] Mr McMurdo gave evidence that on Tuesday, 1 March 2011, after his mobile phone had been charged, he had noticed late in the day that Mr Norris had attempted to call him. It was common ground between the parties that Mr Norris had not left any message for Mr McMurdo when he did so.

[9] The following day, Mr McMurdo enrolled his son in a local school and then telephoned the respondent's offices at around 12.30pm. Mr McMurdo states that the telephone had not been answered and that the office answer machine had kicked in and so Mr McMurdo had left a message for his employer to say that he was trying to get back to Christchurch as quickly as possible. Mr McMurdo produced a Telecom printout of calls made from his mobile phone which proved that he had made a 42 second phone call to the offices of the respondent on 2 March 2011 at 12.29 pm. I am therefore satisfied that Mr McMurdo did make an effort to keep his employer informed of his whereabouts and his intentions.

[10] During the following days, Mr McMurdo was waiting for a meeting with the Hastings WINZ office so that he could obtain funds for his journey back to Christchurch. Having finally obtained funds for the journey, Mr McMurdo telephoned Mr Norris and told him that he would be back at work on Wednesday, 9 March 2011.

[11] Mr McMurdo attended work on Wednesday, 9 March and noted that the words *no word from him. Abandonment of employment* had been written in his time book. This had been written in relation to the period 28 February to 4 March. Mr and Mrs Norris were not in Christchurch at that time, but were attending a yachting race in Wellington.

[12] Understandably, the note in his time book caused Mr McMurdo some considerable anxiety and on Thursday, 10 March 2011 Mr McMurdo telephoned Mr Norris' mobile telephone to ask him what was happening. Mr Norris' evidence of this conversation was that he had been in a skippers' meeting when the call came through, and had had no idea what Mr McMurdo was talking about as he had not been aware of the note in the time book, which had been written by his wife. Mr Norris gave evidence that he had been annoyed with Mr McMurdo for calling him from the office phone, thereby costing the company money, and when he should have been working. Mr McMurdo gave evidence, which Mr Norris did not disagree with, that Mr Norris had told him that he would talk to him on the following Monday.

[13] Mr McMurdo attended work on Friday and then attended work at his normal time of 7.30am on Monday in order to find out what the note in the time book meant and whether he still had a job. Unfortunately, because of Mr McMurdo's agitation and due to some teasing that he had received from his work mates, Mr McMurdo lost his temper when he found out that Mr Norris was not available to see him and effectively stormed out of the premises stating words to the effect that he would sue Mr Norris. The reason that Mr Norris had not been available to see Mr McMurdo was that he had still been travelling back from Wellington that morning.

[14] Later that day Mr McMurdo sought advice from his adviser, Ms Burness, who sensibly advised him to call Mr Norris to attempt to talk to him. Mr McMurdo did so that afternoon but Mr McMurdo gave evidence that Mr Norris had told him that he did not wish to speak to him. Mr Norris' evidence was that, when he received the telephone call from Mr McMurdo that afternoon, he had asked Mr McMurdo why he was not at work and, when Mr McMurdo replied that he wanted a meeting with him, Mr Norris had said that he did not want to meet with Mr McMurdo *at that time*. Mr Norris said that by then he had heard from several people that Mr McMurdo had said that he would sue Mr Norris and so Mr Norris *wanted to get his head around what had happened*.

[15] Mr Norris' evidence was that, when his wife had written the words *abandonment of employment* in Mr McMurdo's time book, she had done so without talking to him and that the business was so busy that Mr Norris had no intention of treating Mr McMurdo as having left his employment because he wanted him back as soon as possible. I accept that evidence as true.

[16] Mr Norris also gave evidence that, when Mr McMurdo had called him on Monday, 14 March 2011, after having stormed out, he had not decided what he would do about Mr McMurdo's employment. He said that he had interpreted the telephone conversation as meaning that Mr McMurdo had chosen to leave his employment. He confirmed that he had not attempted to get in touch with Mr McMurdo thereafter, although he had later received Ms Burness' letter raising a personal grievance on behalf of Mr McMurdo.

[17] It is obvious that several discussions took place between the parties after Monday, 14 March 2011 during which the respondent invited Mr McMurdo to return to work. Unfortunately, by this time, directly due to the earthquake, the carer who had looked after Mr McMurdo's son could not do so any more so that Mr McMurdo had to work part time to accommodate his son's needs. Mr McMurdo confirmed that this need arose almost immediately after the earthquake and that he now works part time hours that suit his child care needs.

[18] Mr McMurdo's evidence was a little uncertain as to what part time hours he had needed to work at that time and it was Mrs Norris' evidence that she had understood that he had been asking for school hours; that is to say, between 9.30am and 2.30pm. Mr Norris gave evidence that it would not have been possible to have accommodated these hours. He explained how Mr McMurdo had worked in a team and that if he had worked part time, jobs carried out by that team would have taken longer, which would have impacted upon the quality of the respondent's service. He was also required from time to time to travel, necessitating an early start. I am satisfied, therefore, that it would not have been practicable for the respondent to have taken Mr McMurdo back on a part time basis in the terms that they reasonably understood that to mean at the time.

[19] I am also satisfied that, even if Mr McMurdo's employment had not ended as it did, his requirement to work part time after the earthquake would have meant that his employment would more likely than not have ended in any event, as the respondent could not reasonably have accommodated the part time hours that he needed to work.

Findings

[20] I am satisfied that Mr McMurdo's employment had not been treated as abandoned during the period 28 February to 4 March 2011 by the respondent. Whilst this had been written into his time book by Mrs Norris, it was not she who made decisions about the employment of staff, and Mr Norris had wished Mr McMurdo to return to work because of the needs of the business. If I am wrong in this, Mr McMurdo's employment was reinstated by the respondent when he returned to work on 2 March 2011 and allowed to work.

[21] With respect to the period from Monday, 14 March 2011, this appears to be a classic case of a *heat of the moment* situation in which Mr McMurdo had reasonably believed himself to have been dismissed as a result of previous events and the telephone conversation with Mr Norris on that day but, at the same time Mr Norris did not have that settled intention in his mind.

[22] I am satisfied that following that telephone conversation, genuine attempts had been made by the respondent to bring Mr McMurdo back to work but that those attempts had proven abortive when it had emerged that Mr McMurdo had had a requirement to return on a part time basis which the respondent had been unable to accommodate, for good reasons.

[23] Therefore, I do not find that Mr McMurdo had been unjustifiably dismissed by the respondent on the grounds that it had never been Mr Norris' intention to dismiss Mr McMurdo or to treat his employment as abandoned and that, once it had emerged that Mr McMurdo had mistakenly considered himself to have been dismissed, Mr Norris had attempted to bring him back to work.

Disadvantage claim

[24] Section 103(1)(b) of the Employment Relations Act 2000 provides that a personal grievance includes a grievance that *the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer.*

[25] Section 103A of the Act, as it was enacted prior to 1 April 2011, provided that *for the purposes of section 103(1)(a) and (b), the question of whether an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time theaction occurred.*

[26] Mr McMurdo's claim of disadvantage was that he had been treated differently from other employees. No evidence was given as to how he had been treated differently, but if he is relying on a note having been written in his timesheet that he had abandoned his employment, all other employees had reported to work on Monday 28 February as expected by the respondent, so any difference in treatment in relation to the note would have been justified.

[27] However, I am empowered pursuant to s.160(3) of the Employment Relations Act 2000, in investigating the matter, to concentrate on resolving the employment relationship problem, however described. I believe that a disadvantage grievance can be made out arising from the following actions by the respondent:

- a. The writing of words in Mr McMurdo's time book by Mrs Norris which had caused him to believe that he had been treated as having abandoned his employment; and
- b. the way that Mr Norris had treated Mr McMurdo when he had telephoned Mr Norris on Thursday 10 March 2011 to clarify the meaning of the words *abandonment of employment*.

[28] With respect to the first action, although the evidence was that Mrs Norris was not the decision maker in respect of who was to be dismissed, Mrs Norris carries out an important administrative role within the company, and is a joint owner of the business. I am therefore satisfied that the respondent bears responsibility for her action in writing the words in Mr McMurdo's time book. It was reasonable for Mr McMurdo to have inferred from the words that they had been written with the knowledge and approval of his employer.

[29] I do not believe that Mrs Norris had acted in bad faith when she had decided that Mr McMurdo had abandoned his employment, prompting her to write the note in

the time book. Whilst I accept that Mr McMurdo had left a message on the office answer machine about him returning to work, I equally accept that Mr and Mrs Norris had not heard it when they had been going through the messages. This could have been because there had been a large number of messages that had been left on the answer machine in the days following the earthquake, resulting in it being missed, or because of a technical fault.

[30] Whilst accepting that Mrs Norris had not acted in bad faith in deciding that Mr McMurdo had abandoned his employment, I do find that a fair and reasonable employer would not have reached the view that an employee had abandoned his employment a few days after the biggest catastrophe that had ever befallen Christchurch, given the disarray that the earthquake had caused amongst the community by virtue of which many thousands of people had been temporarily dispersed around New Zealand in its immediate aftermath. The disadvantage that the writing of these words in his time book had caused Mr McMurdo was the creation of an incorrect perception that his employment may have been treated as having terminated.

[31] It is also unfortunate that Mrs Norris had decided to treat one of the respondent's employees as having abandoned his employment without having informed Mr Norris of that fact. If she had done so, Mr Norris, on his evidence, would have informed her that he did not wish Mr McMurdo's employment to be treated as having been abandoned and the note could have been deleted.

[32] With respect to the second action by the employer which I find amounts to a disadvantage in Mr McMurdo's employment, he had been entitled to inquire urgently about the meaning of the words written in his time book, which had appeared to denote that his employment had been treated as having ended. Mr Norris' response to Mr McMurdo's enquiry (to tell him not to make calls on the office phone, and to get back to work), was not the action that a fair and reasonable employer would have done in all the circumstances at the time.

[33] Even though Mr Norris had not been aware of the note that had been written in Mr McMurdo's time book at the time of Mr McMurdo's call, Mr Norris must have discerned the anxiety being manifested by Mr McMurdo during the telephone call and should have made enquiries of Mr McMurdo as to what note he was referring to. If

he had done so, he could have informed Mr McMurdo in a matter of moments that his employment had not been treated as abandoned.

[34] The disadvantage caused to Mr McMurdo in his employment by this action of Mr Norris was that, despite having spoken to the man he regarded as his boss, nothing was said to him to relieve him of the reasonable belief that his employment was at risk of having been treated as abandoned, a belief that was not, in fact, accurate.

[35] In summary, it is my view that the combined effect of Mrs Norris having made a note treating Mr McMurdo as having abandoned his employment, together with Mr Norris' failure to enquire about and address Mr McMurdo's concerns when he had called, resulted in an unjustified disadvantage to Mr McMurdo in his employment which had caused him stress and anxiety.

[36] Therefore, I consider that it is appropriate to award Mr McMurdo compensation pursuant to s.123(1)(c)(i) of the Act in relation to the injury to feelings suffered by Mr McMurdo. I fix that sum at \$4,000. I do not consider that Mr McMurdo contributed to the situation giving rise to this aspect of his personal grievance in any blameworthy way (or at all), and therefore I do not consider that it is appropriate to reduce this award of compensation pursuant to s.124 of the Act.

Costs

[37] Mr McMurdo is in receipt of legal aid. Costs are reserved, and any claim for costs by Mr McMurdo should be made by lodging and serving a memorandum within 28 days of the date of this determination. The respondent will have a further 14 days to lodge and serve any reply.

David Appleton
Member of the Employment Relations Authority